

POLICY AND LEGAL OPTIONS FOR SUPPORTING PASTORALISM AT COUNTY/INTER-COUNTY LEVELS IN KENYA

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OVERALL CONTEXT

There has been significant progress in policy and institutional development over the past one and a half decades with respect to pastoralism in Kenya. Pro-pastoralist policies have been adopted, and institutions created with mandates for drylands development, underpinned by recognition of pastoralism as the appropriate primary livelihood and land use system for the ASALs.

Thanks to the introduction of devolution by the Constitution of Kenya 2010, there are improved opportunities for pastoralists to influence planning and action at the county level, and for county governments to collectively influence national policy towards the ASALs.

These national developments have occurred within a regional and global policy context that is also increasingly positive in its attitude to pastoralism and other smallholder production systems.

Yet there remain significant challenges in translating policy stipulations into action on the ground to strengthen pastoralism and to secure pastoral livelihoods. Competing policy and institutional imperatives at county, national, regional and global levels hinder implementation of pro-pastoralist policies. Key policy and technical personnel in both county and national governments continue to subscribe to a narrative of development that negates the positive stipulation of official policy documents. Pastoralists are limited in their capacity to influence plans, strategies and budgets of county and national governments, even where they have had significant influence in determining the content of policy documents.

A. POLICY OPPORTUNITIES FOR SUPPORTING PASTORALISM

1. Kenya Vision 2030

The three pillars on which V2030 is anchored are of direct relevance to pastoralism:

- i. **Economic pillar** seeks to spur economic growth so as to generate resources that will be used to meet the SDGs and the goals of the Vision. Flagship projects under the pillar target agriculture, education, health, water and environment, all of which are priority concerns for pastoralists.
- ii. **Social pillar** seeks to promote just, cohesive and equitable social development in a clean and secure environment. The challenges that pastoralists have historically faced in Kenya clearly signify the absence of justice, cohesion and equity in society; so that efforts to establish these values are bound to be beneficial to pastoralists.
- iii. **Political pillar** seeks to establish an issue-based, people-centred, result-oriented and accountable democratic system. Such a system is conducive to the advancement of the interests of pastoralists.

Similarly, the **foundations for socio-economic transformation** articulated by V2030 are all of direct relevance to the needs of the ASALs and if established, provide an enabling framework for pastoralism.

- i. **Infrastructure** is specifically stated to be “a necessity in improving the livelihoods by people living in ...pastoral districts” (p.10)
- ii. **Science, technology and innovation** offer the promise of finding solutions to challenges of pastoralism that are grounded on the objective reality of the ASALs, while drawing on the dynamic developments in ICT and the knowledge economy.

- iii. **Land reforms** open up the opportunity for strengthening communal land rights and to empower traditional systems and institutions of land governance and management that form the foundation for pastoralism.
- iv. **Human resource development** addresses a key constraint in ASAL development, namely the availability of appropriately trained and motivated personnel to spearhead development in the ASALs
- v. **Security** is a major issue in the ASALs, as insecurity has undermined opportunities for sustainable development of the region. All the sources of insecurity listed in V2030 (*availability of small arms and light weapons, political violence, resource conflicts, and cattle rustling*) have direct relevance to pastoralists and pastoralism.
- vi. **Public service reform** will improve the delivery of public services that are needed to spur and sustain citizen and community initiatives for development in pastoral areas.

1.1. Vision 2030 Development Strategy for Northern Kenya and other Arid Lands

The Strategy was developed by the Ministry of State for Development of Northern Kenya and other Arid Lands (MNKOAL) to complement and deepen V2030 by explaining how its goals would be realised in the specific context of Northern Kenya and the ASALs, which had historically been marginalised by development policies of post-independent Kenya.

It sets out the kind of investments needed for the ASALs to benefit from V2030, explains the distinctive characteristics of the region and their implications for appropriate development planning, and sets out broad strategies and priorities to be pursued.

1.2. Medium Term Plan II 2013-2017

MTP constitutes the implementation framework for V2030. The second MTP, which runs to the end of the current financial year makes the following assertion about pastoralism (p.42):

Pastoralism is affected by the disruption of seasonal transhumance patterns, the expansion of community conservancies, the unchecked influx of people and livestock, and the spread of invasive species. Pastoralism nevertheless remains the dominant production system in the ASALs and underpins its regional economy. In some counties, it provides employment and food security to more than 70 per cent of households.

The MTP includes a host of flagship projects in support of pastoralism and ASALs development that include policy, legal and institutional reforms targeting: domestication of African Union Policy Framework for Pastoralism in Africa; promulgation of a Policy on Small Arms and Light Weapons (SALW); development of trans-boundary waters policy and management strategy; finalization of the NDMA Bill; and creation and operationalization of the ASAL Secretariat, the National Council on Nomadic Education in Kenya, the Livestock Marketing Board, and the National Drought and Disaster Contingency Fund.

The **third Medium Term Plan for the period 2018 to 2022** is currently being finalized, to take effect at the commencement of the next financial year on 1st July 2018.

2. Ending Drought Emergencies (EDE) Common Programme Framework

The Common Framework to End Drought Emergencies (EDE) is a ten-year programme that seeks to end drought emergencies by 2022. It is a strategy that emerged from IGAD's regional strategy for resilience – IGAD Drought Disaster Resilience and Sustainability Initiative (IDDRSI), established following the Summit of Heads of State and Government on the Horn of Africa Crisis held in Nairobi in September 2011. The strategy has been embraced by the national and county governments and endorsed by development partners. The first phase of the programme ran from July 2014 and comes to an end in June 2018.

The Programme seeks to strengthen resilience of communities in the ASALs to drought and other effects of climate change and to contain the impacts of drought through its focus on three areas, namely:

1. Eliminating the conditions that perpetuate vulnerability;
2. Enhancing the productive potential of the ASALs; and
3. Strengthening institutional capacity for effective risk management

The EDE Common Programme Framework is structured around two priorities. The first priority is to **accelerate investment in the foundation for development**; while the second priority is to **strengthen the institutional and financing framework for drought management**. The first priority has four pillars (1-4 below), while the second priority has two pillars (5-6 below).

The expected results of the EDE Programme Framework are all of direct relevance to pastoralism, and if achieved will address many constraints for the livelihood system. The results, which constitute the Pillars of the EDE CPF are:

1. **Peace and security** - effective response to peace and security threats in the ASAL counties by strengthened peace and security infrastructure;
2. **Climate-proofed infrastructure** - the deficit of climate-proofed productive infrastructure and its maintenance is identified, planned and progressively addressed in a coordinated and comprehensive manner at national, county and community level;
3. **Human capital** - a more healthy, skilled, innovative, resourceful and motivated human capital in the ASAs;
4. **Sustainable livelihoods** - enhanced resilience of ASAL livelihoods to the effects of drought and climate change;
5. **Drought risk management** - institutions, mechanisms and capacities that build resilience to drought and climate change developed and strengthened; and
6. **Institutional development and knowledge management** - robust ASAL institutions exist and support EDE investment, policy and programme decisions, based on critical evidence generated by solid knowledge management systems.

3. Sector Plan for Drought Risk Management and Ending Drought Emergencies (EDE) – Medium Term Plan III 2018-2022

Medium Term Plan III places emphasis on policies and programmes that can build on EDE MTP II to lessen poverty and build long-term resilience to droughts. Flagship projects of direct relevance to pastoralism are on: construction of livestock export zones; fodder/pasture production and conservation; and expansion of livestock insurance to all ASAL counties. Other priority interventions of direct relevance to pastoralism include:

1. **Strengthening alternative dispute resolution (ADR) and conflict resolution mechanisms at the grassroots level**, including through the adoption and operationalization of the National Policy on Small Arms and Light Weapons, strengthening of county peace mediation structures for local and cross-border peace building, and building the capacity of national and local institutions on conflict and security dynamics.
2. **Construction and rehabilitation of water management systems** for households, livestock and crop production.
3. **Improvement of animal production and health, livestock marketing infrastructure and rangelands management**, including through improved governance of land tenure
4. **Reducing drought risk and vulnerability and strengthening households' adaptive capacity**, including through improved resource mapping, drought contingency planning and response, creating and/or operationalizing County Climate Change Funds, and mainstreaming of drought resilience in sector plans.

4. Sessional Paper No. 8 of 2012 on the National Policy for Development of Northern Kenya and other Arid Lands (ASAL Policy)

The ASAL Policy seeks to address three critical policy challenges, two of which have direct implications for pastoralism. The three challenges are:

1. How to close the developmental gap between Northern Kenya and the ASALs and thereby strengthen national cohesion;
2. How to protect and promote the mobility and institutional arrangements that are essential to productive pastoralism; and
3. How to ensure food and nutrition in the ASALs in a context characterised by increasing climate change

The fourth element of the Policy is focused on strengthening pastoralism as a livelihood and land use system. It seeks to **strengthen the climate resilience of communities in the ASALs and ensure sustainable livelihoods** through interventions that target:

- i. Drought management and climate change
- ii. Land and natural resource management
- iii. Livestock production and marketing
- iv. Dryland farming
- v. Livelihood diversification
- vi. Poverty and inequality

The Policy also proposes an institutional and legal framework for coordination of ASALs development that includes:

- **An ASAL Cabinet Sub-Committee** – to be chaired by the President or Deputy President, to provide high-level policy direction and political support to ASAL development;
- **An ASAL Inter-Ministerial Committee**, that brings together Principal Secretaries from key sector ministries;
- **An ASAL Stakeholders' Forum**, bringing together Government, UN agencies, development partners, NGOs and the private sector;
- **An ASAL Transformation Secretariat** to provide technical and administrative support to the transformation structures

To facilitate sustained development in the ASALs, the Policy proposes the establishment of a number of structures that include:

- National Drought Management Authority
- National Drought and Disaster Contingency Fund
- National Council on Nomadic Education
- Northern Kenya Education Trust
- Livestock Marketing Board, and
- Northern Kenya Investment Fund

4. Sessional Paper No. 3 of 2009 on National Land Policy

The overall objective of the National Land Policy is “to secure rights over land and provide for sustainable growth, investment and the reduction of poverty in line with Government’s overall development objectives”.

The Policy addresses critical land tenure constraints to pastoralism through its recognition of community land. It also categorizes pastoral land issues among “land issues requiring special intervention” and articulates policy options for strengthening pastoralism as a land use and production system.

The stipulations of the Policy with regards to community land are of direct relevance to pastoralism in so far as they provide for:

- Investing in capacity building for communal land governance institutions and facilitating their operations;
- Facilitation of flexible and negotiated cross-boundary access among communities

The policy articulates the following specific stipulations for securing pastoralists livelihoods and land tenure:

1. Recognize pastoralism as a legitimate land use and production system;
2. Review the Land (Group Representatives) Act and provide for pastoralism in the “Land Act”;
3. Establish suitable methods for defining and registering land rights in pastoral areas while allowing pastoralists to maintain their unique land systems and livelihoods;
4. Establish a legislative framework to regulate transactions in land in pastoral areas;
5. Ensure that the rights of women in pastoral areas are recognized and protected;
6. Provide for flexible and negotiated cross boundary access to protected areas, water, pastures and salt licks among different stakeholders for mutual benefit; and
7. Ensure that all land uses and practices under pastoral tenure conform to the principles of sustainable resource management.

5. National Climate Change Response Strategy (NCCRS)

The National Climate Change Response Strategy was developed to respond to the opportunities and challenges of climate change with a view to creating a prosperous and climate resilient country. It presents a comprehensive outline of the threats posed by climate change in Kenya, a programme of activities and actions to combat impacts of climate change, and an enabling implementation framework.

The Strategy proposes the following adaptation interventions that are specific to rangelands management, livestock and pastoralism:

- Developing special livestock insurance schemes;
- Breeding of animals that adapt well to climatic vagaries;
- regular vaccination campaigns;
- promotion of economic livelihood diversification, e.g. cultivation of drought-tolerant food crops such as millet and bee-keeping for honey production and
- awareness campaigns among pastoral communities to underscore the importance of balancing stocking rates with the available land resources as a way of ensuring sustainable pastoralism

Also of relevance to pastoralism are interventions in other specific sectors such as: health, agriculture, water, tourism and wildlife management, physical infrastructure, and social amenities.

Mitigation interventions aimed at creating a Green Economy based on wind and solar power have a direct bearing on pastoralism as the ASALs are seen as holding the greatest potential for these.

B. OPPORTUNITIES WITHIN THE LEGAL FRAMEWORK

Apart from the policy instruments listed above, a number of laws have been enacted that have a bearing on pastoralism and pastoral livelihoods.

The Constitution of Kenya 2010

The Constitution was enacted after a long process of consultations, spanning nearly two decades. It introduced significant reforms in political organization and decision-making as well as land and natural resource governance.

The Constitution introduces some critical reforms that improve opportunities for implementation of pro-pastoralist programmes, as highlighted below:

1. Devolution – access to services, participatory planning and governance

The Constitution introduces devolution, with a stipulation that

a national State organ shall ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate do so having regard to the nature of the service” (Art. 6(3))

This addresses the historical failure to make government services (such as veterinary health services) accessible to pastoralists.

Objects of devolution include:

- to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them (**Art. 174(c)**);
- to recognize the right of communities to manage their own affairs and further their development (**Art. 174(d)**)

The **division of functions between the national and county governments** is set out in the Fourth Schedule to the Constitution. Powers and functions of the County Government that have a direct bearing on pastoralism include:

- animal husbandry
- livestock sale yards
- county abattoirs
- plant and animal disease control
- veterinary services
- markets
- land survey and mapping
- boundaries and fencing
- soil and water conservation
- water and sanitation services

Counties have the power to make laws. Their legislative authority is vested in County Assemblies, which have the power to

...make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government (Art. 185(2))

County Assemblies also have the power to

...receive and approve plans and policies for the management of and exploitation of the county’s resources (Art. 185(4)(a))

The **County Governments Act** and the **Urban Areas and Cities Act** have been enacted to implement devolution provisions of the Constitution.

2. National values and principles of governance (Art. 10)

The national values and principles of governance “bind all state organs, State officers, public officers and all persons” applying or interpreting the constitution, enacting, applying or interpreting any law, or making or implementing public policy decisions.

All the values and principles are of relevance to pastoralists as citizens of Kenya, but of particular significance to them are the following that address historical and current constraints to their livelihoods and production system:

- ✓ democracy and participation of the people
- ✓ equity
- ✓ inclusiveness
- ✓ non-discrimination and protection of the marginalized
- ✓ sustainable development

3. **Affirmative action to integrate minorities and marginalized groups (Art. 56)**

The State “shall put in place affirmative action programmes to ensure that minorities and marginalised groups” *inter alia* **develop their cultural values, languages and practices (Art. 56(d))**.

Article 260 includes pastoralists in the definition of marginalized communities.

4. **Community land (Art. 63)**

The Constitution entrenches community land as a classification of land in Kenya, thereby providing an opportunity for strengthening pastoral land rights.

“Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest” and includes land that is lawfully held, managed or used by specified communities as grazing areas.

The **Community Land Act** was enacted in September 2016 to implement the community land provisions of the Constitution and stipulations of the National Land Policy.

5. **Equalization Fund to redress historical marginalization**

Article 204 establishes an Equalization Fund

...into which shall be paid one half per cent of all the revenue collected by the national government each year calculated on the basis of the most recent audited accounts of revenue received, as approved by the National Assembly

The Equalization Fund shall be used

...only to provide basic services including water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible.

The provisions of Article 204 shall lapse 20 years after August 2010, unless the period is extended through the procedure set out in Article 204(8)

Summary Matrix on Opportunities for Pastoralism in Policy and Legal Framework

Three critical trajectories of reform can be identified, namely: governance (political organization and decision-making); economic development planning; and land governance and natural resource management.

Reform Trajectory	Policy/Legal Instrument and reforms introduced	Opportunities for Pastoralism
Governance (political organization and decision-making)	<ol style="list-style-type: none"> 1. Kenya Vision 2030 2. V2030 Development Strategy for NK and other Arid Lands 3. MTPs and EDE CPFs <ul style="list-style-type: none"> - Economic Pillar focus on improving livestock production in ASALs - Social Pillar focus on equity and redress of historical 	Focus on priorities that are of relevance to the pastoral economy; creating enabling environment for the practice of pastoralism through establishment of livestock management and other infrastructure

	<p>marginalization</p> <ul style="list-style-type: none"> - Political Pillar focus on security peace building, and conflict management - Security as a foundation for economic transformation 	
	<p>Constitution of Kenya 2010</p> <ul style="list-style-type: none"> - Devolution - National values and principles of governance 	Local level decision-making, participation of pastoralists in governance, participatory development planning, obligation of national government to address historical marginalization
Economic development planning	<ol style="list-style-type: none"> 1. Constitution of Kenya 2010 2. County Governments Act 3. Urban Areas and Cities Act 4. County Integrated Development Plans (CIDPs) <ul style="list-style-type: none"> - Affirmative action - Equalization Fund 	Redressing historical marginalization by availing resources for development of infrastructure and social services; participatory determination of local priorities and control of resource allocation
Land and natural resource governance	<ol style="list-style-type: none"> 1. National Land Policy 2. ASAL Policy 3. Community Land Act 4. National Spatial Plan 5. County Spatial Plans <ul style="list-style-type: none"> - recognition of communal land tenure and pastoral land rights - recognition of traditional institutions of land governance, especially for dispute resolution - provisions for communal land use planning and negotiation of cross-community access - recognition of mobility as a strategy for nrm 	Opportunities for strengthening common property resource management, inter-community negotiation of access to pastoral resources, pastoral mobility, and traditional institutions of land and natural resource governance

Conclusion

The foregoing discussion show that there has been substantial progress in key policy areas, creating opportunities that can be used to strengthen pastoralism as a livelihood, land use and production system. However, many of the policies are still new, with limited or no implementation frameworks in place. In some cases, laws for implementation of the policies have not been enacted, and even where laws have been enacted, Regulations are not in place. Institutional capacity is also a critical challenge, especially at devolved levels. Counties have powers vested in them by the Constitution, but not necessarily the institutional, technical and financial resources needed to perform their functions effectively and sustainably. Finally, competition between national and county governments on the distribution of power, functions, and resources has continued to undermine the effective implementation of devolution.